



HHS ACQUISITION NEWSLETTER

News and Information for Procurement Professionals

CONFLICTS OF INTEREST

A Little-known Pitfall for the C.O.

by Mike Colvin

A recent protest at the National Cancer Institute proved educational for everyone involved, including the contracting officer, the HHS counsel and the author of this article. The protest in question was filed by Cygnus Corporation against an award to Palladian Partners for conference support services and editorial support services. The original protest included the usual litany of complaints, that NCI had misevaluated the technical proposals, that the awardee's lower cost was unrealistic, and that Palladian had engaged in "bait-and-switch" tactics.

As frequently happens, when the agency responded to the protest with a complete set of documents pertaining to the procurement, the protester combed through this new information and came up with new protest grounds to supplement the original ones. Among these new allegations was the charge that award to Palladian created an impermissible personal conflict of interest, because one of the co-owners was married to a government employee.

This piece of information was news to everyone involved, and turned out to be true. Palladian was owned by two women, and one of them was married to a doctor at the National Institute of Neurological Disorders and Stroke, another arm of NIH. Cygnus thought it had found a smoking gun when it noticed that the awardee had letters of credit secured by collateral which turned out to be the jointly-owned residence of the wife and her NINDS husband. The husband, a government employee, clearly had an "interest" in the business and stood to profit from the contract (so said the protester).

On the agency side, we all went scurrying to the regulations and to prior GAO cases. The applicable regulations are found in Part 3 of the FAR, a section that seems to be a real hodge-podge. It deals with gratuities, contingent fees, antitrust violations, procurement integrity and the more familiar post-employment

restrictions for government employees. Subpart 3.6 is the one relevant to this protest, entitled "Contracts with Government Employees or Organizations Owned or Controlled By Them." The language is very clear: "...[A] contracting officer shall not knowingly award a contract to a Government employee or to a business concern or other organization owned or substantially owned or controlled by one or more Government employees. This policy is intended to avoid any conflict of interest that might arise between the employees' interests and their government duties, and to avoid the appearance of favoritism or preferential treatment by the Government toward its employees."

All sorts of questions began swirling through our heads. The contracting officer began asking herself "Did I do something wrong? Should I have known somehow that this company was owned by a woman whose husband works for NIH?" The more we researched GAO decisions, the less worried we became. As our readers surely know, there is neither "rep" nor "cert" pertaining to whether an offeror is owned or controlled by a government employee. It seems to be a real pitfall waiting to catch the unwary. Prior GAO cases seemed to indicate that, even if we learn of such a conflict of interest after award, we should terminate the contract, since we must avoid even the "appearance of favoritism."

The protester was pounding hard on a prior protest decision in which a married couple owned a company bidding on government contracts. When the relationship came to light, the husband attempted to divest himself of ownership and control, turning everything over to his wife. GAO found this unconvincing, and recommended that the proposed award not be made. We argued that the husband in our acquisition had never had ownership, was not employed by the same institute and could not exert any influence over the procurement. Other GAO cases seemed to show that a familial relationship, in and of itself, is not sufficient to create an actual conflict of interest or even an appearance of one. We even stooped to arguing before GAO that it would be "sexist" to assume that the wife must inevitably be controlled by her husband, even though she was one of the founders of the company and has a separate career.

In the end, GAO agreed with us and denied the protest. What is scary to contemplate is that this was one of those cases where we could have lost, through no fault of our own, if the facts had been slightly different. It could have happened that the husband really was a part-owner or director of the company, and it could have happened that we would have had to terminate once those facts came to light.

Is there a lesson here for our contracting officers? Well, not really. If an offeror has an impermissible, personal conflict of interest, we really have no way of knowing, unless he voluntarily confesses! I didn't tell this story just to give our readers nightmares but simply to entertain. You may read all the gory details in Cygnus Corporation, B-275957; B-275957.2, April 23, 1997. Congratulations to NCI Contracting Officer Janet Mattson for following all the rules and prevailing in the end.

THE PROPER ROLE OF THE CONTRACTING OFFICER

The Buck Stops Here, So Don't Abdicate Your Authority

by Norman Audi

At times, it behooves us to review the role we play in the procurement process. We need to know our responsibilities, limitations, and powers before the contracting officer signs his/her name to a contractual document.

FAR 6.102-1 sets forth the authority of the contracting officer. Section (b) states:

No contract shall be entered into unless the contracting officer ensures that all requirements of law, executive orders, regulations, and all other applicable procedures, including clearances and approvals, have been met.

The contracting officer has an obligation to assure that the procurement and the resultant contract adhere to the all applicable rules.

But the contracting officer is not just a policeman -- the job includes more than that. FAR 1.102-2 sets forth the responsibilities of the contracting officer, which are:

Contracting officers are responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships. In order to perform these responsibilities, contracting officers should be allowed wide latitude to exercise business judgment. Contracting officers shall --

(a) Ensure that the requirements of 1.602-1(b) have been met and that sufficient funds are available for obligation:

(b) Ensure that contractors receive impartial, fair, and equitable treatment; and

(c) Request and consider the advice of specialists in audit, law, engineering, transportation, and other fields, as appropriate.

Contracting officers have wide latitude in exercising business judgment. We have to make a determination that what the Government is receiving is worth the cost. We have to determine that the price is fair and reasonable. We have to look at the process and determine the following: Is the process fair and equitable to all parties? Is the competition real or only perceived? Do the losing offerors have faith in the contracting process? That means, do the offerors have faith in the integrity of the contracting officer and the project officer? Are we sufficiently aware of the market place to determine that our offerors are responsible in their field? Do we know the technical aspects of the requirement sufficiently that we can converse responsibly about the requirement? Are we just paper pushers or are we business professionals who can add value to the process? Can we aid the project officer in obtaining a good contractor in a timely and efficient manner? Do we just say, "No, you can't do that," or do we have constructive suggestions available in our bag of contracting tricks to present reasonable alternatives? If our project officers are taking their requirements to other contracting officers, do we go back to them to find out why? Do we use these as learning experiences to try and improve? Are we approaching our job so we can have the proper balance between service and our fiduciary responsibility?

That brings me to another point. The contracting officer considers the advice and recommendations of experts; however, the final determination is that of the contracting officer. Before signing a contract or contract modification for new or changing requirements, the contracting officer has to determine that the deal is in the best interests of the Government. Negotiations cannot take place between project officers and contractors without the contracting officer being part of the negotiations. If site visits are necessary to complete a negotiation, then the contracting officer should be part of the team on the visit.

When a project officer negotiates a contract change without the contracting officer, the agreement does not and should not be agreed to by the contracting officer, unless the ratification process is entered into.

What happens when the contracting officer is presented with a negotiated deal without being part of the negotiation? Don't sign it. Kick it upstairs and document the file as to why you refuse to sign. I did this several times when I was a negotiator at the Office of Education with no retribution. Don't be afraid

to take a stand if the facts justify your position. You have been given signatory authority. Sign your name when you can defend the deal. Don't be forced into signing, if you can't.

Finally, I consider these the marks of a good contracting officer: He/she should be knowledgeable in contracting principles and in the marketplace; above reproach in dealing with the public; helpful to the project officer; in possession of a "servant's heart" in trying to be helpful to all involved in the procurement process; able to convince project officers, SADBUS, lawyers, supervisors, auditors, offerors, contractors, etc. of the rightness of their position on a matter; able to decipher which of the new, unique, and/or quirky concepts should apply to the latest procurements; and finally, become knowledgeable and helpful to the extent that he or she becomes a source when advice is sought.

PERFORMANCE-BASED CONTRACTING

by Marc Weisman

Many of our readers may be aware that the acquisition function for the Office of the Secretary was significantly downsized as the result of the government-wide buyout and several long-planned retirements. In restructuring this office we intended to create an office which could conduct procurements for the Office of the Secretary in a manner which would closely link acquisition policy initiatives with real procurements to test the viability of new procurement procedures.

Recently this office conducted procurements for custodial services, security guards, and elevator maintenance. All three acquisitions were conducted as competitive small business set-asides. All three procurements utilized the same structure and were focused to validate Performance Based Contracting concepts.

The Statement of Work:

- o The solicitations incorporated performance-based work statements. The work statements were generic and were obtained from the web site for the Office of Federal Procurement Policy (ARNET). These work statements were then slightly modified to fit our needs. (Copies of sample PBSC work statements were recently sent to ECA members on May 15.)

Evaluation Factors:

- o Proposal evaluation was based on technical, past performance, and business factors.

- o The technical evaluation was divided into three parts: a written technical approach, past performance, and an oral presentation. The offerors' written proposals addressed factors such as staff qualifications and technical approach (35 points). The offerors also submitted past performance information on their 5 most recent similar contracts (20 points). The oral presentation presented their quality control plan (45 points).

The Performance Bonus:

- o In addition to the fixed contract rates these contracts also contain a performance bonus pool. The payment of the performance bonus is linked to the contractor's "grade" on their past performance report card. At the discretion of the contracting officer the contractor can earn up to 2% of the value of the contract period for each rating year. The past performance rating is in turn linked to the contractor's successful fulfillment of its quality control plan.

The Oral Presentation:

- o The evaluation criteria in this section were structured to represent an outline for a quality control plan. The offerors were required to explain how they would achieve these quality factors.
- o The solicitation stated that "The presentation must be done in person and must be performed by the management team and the key personnel proposed."
- o The presentations could not exceed 30 minutes. At the conclusion the offerors were required to present a hard copy of the presentation.
- o The contracting officer and the technical evaluation panel were present. Questions were not permitted by either side except for minor points of clarification. The evaluators were required to complete their evaluation work sheets at the conclusion of each presentation. In all a total of 44 offerors made presentations.

The Evaluation:

- o The scores of all the offerors were obtained by adding together the total number of technical, past performance, and oral presentation points. Offers were then ranked high to low.

- o The offerors' price information was then bounced against our market research information for price reasonableness. As an example, our market research revealed that the going rate for janitorial services in the Washington metropolitan area is approximately \$0.58 per square foot per month. Of the 27 proposals received on the custodial solicitation over 20 offerors were within a penny or two of this rate.

The Award:

- o On all 3 solicitations we moved directly to award without establishing a competitive range and without negotiations.
- o In each case award was made to the offeror with the highest combined technical point score, and in each case we were also aided by our ability to find the initial proposed price to be reasonable.
- o In each case award was made at a price which was below the government estimate and the current contract price. Money from these cost avoidance savings was then used to fund the performance bonus pool.

Outcomes:

- o The offerors were comfortable proposing against a performance-based work statement. Questions were minimal during the pre-proposal stage and were mostly answered during the site visits.
- o The award price of all three contracts was lower than the prices of the current contracts.
- o In all 3 competitions the incumbents were replaced.
- o Almost every offeror commented positively on the oral presentation process.

This article provides a sketch of the structure of these competitions. The staff believes that PBSC-linked benefits, such as lower contract pricing, shorter procurement processing time, and linkage of performance incentives to quality, are all possible under well structured PBSC procurements. Copies of these solicitations will soon be available on the OS Acquisition Web Site, and you can contact this office for more information at any time.